

Steve W. Berman (*pro hac vice*)
 Emilee N. Sisco (*pro hac vice*)
 Stephanie Verdoia (*pro hac vice*)
 HAGENS BERMAN SOBOL SHAPIRO LLP
 1301 Second Avenue, Suite 2000
 Seattle, WA 98101
 Telephone: (206) 623-7292
 Facsimile: (206) 623-0594
 steve@hbsslaw.com
 emilees@hbsslaw.com
 stephaniev@hbsslaw.com

Benjamin J. Siegel (SBN 256260)
 HAGENS BERMAN SOBOL SHAPIRO LLP
 715 Hearst Avenue, Suite 202
 Berkeley, CA 94710
 Telephone: (510) 725-3000
 Facsimile: (510) 725-3001
 bens@hbsslaw.com

Counsel for Plaintiffs and the Proposed Classes

Jeffrey L. Kessler (*pro hac vice*)
 David G. Feher (*pro hac vice*)
 David L. Greenspan (*pro hac vice*)
 Adam I. Dale (*pro hac vice*)
 Sarah L. Viebrock (*pro hac vice*)
 WINSTON & STRAWN LLP
 200 Park Avenue
 New York, NY 10166-4193
 Telephone: (212) 294-4698
 Facsimile: (212) 294-4700
 jkessler@winston.com
 dfeher@winston.com
 dgreenspan@winston.com
 aidale@winston.com
 sviebrock@winston.com

Jeanifer E. Parsigian (SBN 289001)
 WINSTON & STRAWN LLP
 101 California Street, 34th Floor
 San Francisco, CA 94111
 Telephone: (415) 591-1000
 Facsimile: (415) 591-1400
 jparsigian@winston.com

Counsel for Plaintiffs and the Proposed Classes

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 OAKLAND DIVISION

IN RE COLLEGE ATHLETE NIL
 LITIGATION

Case No. 4:20-cv-03919-CW

CLASS ACTION

**SUPPLEMENTAL CASE
 MANAGEMENT CONFERENCE
 STATEMENT**

Hon. Claudia Wilken

1 Counsel for Plaintiffs Grant House, Sedona Prince, and Tymir Oliver (“Plaintiffs”) in the above-
2 referenced action submit this Supplemental Case Management Conference Statement in advance of
3 the Case Management Conference scheduled for September 21, 2023, to update the Court that three
4 Defendants—the Big Ten, the Atlantic Coast Conference, and the Southeastern Conference—served
5 untimely Supplemental Initial Disclosures last week, which raise potential case management issues
6 relating to discovery and scheduling. Plaintiffs have not yet had a chance to fully develop a response
7 to the untimely disclosures nor to confer in good faith with Defendants to address these issues.
8 Nonetheless, Plaintiffs want to make the Court aware of these developments because of the potential
9 impact on case management and the case schedule.

10 The three Defendants’ supplemental disclosures, served more than three years into this litigation
11 and only six weeks before the close of fact discovery, identify dozens of additional individuals or
12 categories of individuals as likely to have discoverable information that the disclosing party may use
13 to support its claims or defenses. Plaintiffs have been prejudiced by Defendants’ unjustifiable delay
14 in making these supplemental disclosures and believe that the untimely nature of these disclosures
15 warrants precluding Defendants’ from calling any newly identified witnesses. *See e.g., Baird v.*
16 *BlackRock Institutional Trust Co., N.A.*, 330 F.R.D. 241, 244–48 (N.D. Cal. 2021) (precluding
17 witnesses in supplemental disclosure near end of fact discovery from testifying at trial); *Finjan, Inc. v.*
18 *Proofpoint, Inc.*, No. 13-cv-05808, 2015 WL 9900617, at *2–3 (N.D. Cal. Oct. 26, 2015) (same);
19 *Vieste, LLC v. Hill Redwood Dev.*, No. 09-cv-04024, 2011 WL 2181200, at *2–3 (N.D. Cal. June 3,
20 2011) (same).

21 If Defendants are not precluded from relying on these witnesses, Plaintiffs will need to take
22 additional discovery. Plaintiffs are still making determinations about additional discovery needed in
23 light of these untimely disclosures, but preliminarily note that the disclosures raise at least the
24 following issues, which may require Court intervention if the parties are unable to reach agreement:

- 25 1. Defendants have identified a variety of new party-individuals and non-party individuals who
26 Plaintiffs may now need to depose. With only five weeks left in fact discovery—and with 16
27 depositions already set to take place during that window—Plaintiffs will likely need to depose
28

1 these individuals outside the fact discovery cutoff. However, Plaintiffs would be prejudiced if
2 Defendants' late disclosures resulted in a delay of the case schedule, particularly the trial date,
3 and will seek an extension of fact discovery to do so while merits expert and summary judgment
4 briefing proceeds on the current schedule.

- 5 2. Defendants have disclosed many witnesses to speak to the issue of the impact of Plaintiffs'
6 requested relief on college athletics, including on student-athlete opportunities, educational
7 programs, and women's and Olympic collegiate sports. These individuals include, *inter alia*,
8 the CEO of USA Water Polo, the CEO of USA Fencing, and "Employees of USA Swimming,"
9 and party consulting groups. Plaintiffs' position is that the potential impact of Plaintiffs'
10 requested relief in the markets for FBS football and Division I men's and women's basketball
11 on other sports is not a legally cognizable procompetitive justification as the Court found in
12 *O'Bannon*. See *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d
13 1126, 1151–52 (N.D. Cal. 2014). Nonetheless, Plaintiffs are entitled to an opportunity to
14 discover all relevant facts from these individuals, including through third-party document and
15 deposition subpoenas. Due to the timing of these disclosures, this discovery may need to take
16 place after the current fact discovery cutoff.
- 17 3. Defendants improperly include broad categories of individuals who may have discoverable
18 information, such as "[r]epresentatives of The Big Ten Member Institutions" and "[c]urrent
19 and former employees of ACC member institutions." These catch-all disclosures fail to
20 provide Plaintiffs with sufficient information to take any necessary discovery. These
21 disclosures are improper, and Defendants should be precluded from calling any witnesses
22 identified solely in this manner. See *e.g.*, *Elite Semiconductor v. Anchor Semiconductor*, No.
23 20-cv-06846, 2021 WL 4808597, at *2 (N.D. Cal. Mar. 17, 2021).

DATED: September 19, 2023

Respectfully Submitted,

WINSTON & STRAWN LLP

HAGENS BERMAN SOBOL SHAPIRO LLP

By: /s/ Jeffrey L. Kessler
JEFFREY L. KESSLER

By: /s/ Steve W. Berman
STEVE W. BERMAN

Jeffrey L. Kessler (*pro hac vice*)
David G. Feher (*pro hac vice*)
David L. Greenspan (*pro hac vice*)
Adam I. Dale (*pro hac vice*)
Sarah L. Viebrock (*pro hac vice*)
200 Park Avenue
New York, NY 10166-4193
Telephone: (212) 294-4698
Facsimile: (212) 294-4700
jkessler@winston.com
dfeher@winston.com
dgreenspan@winston.com
aidale@winston.com
sviebrock@winston.com

Jeanifer E. Parsigian (SBN 289001)
101 California Street, 34th Floor
San Francisco, CA 94111-5840
Telephone: (415) 591-1000
Facsimile: (415) 591-1400
jparsigian@winston.com

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1301 Second Avenue, Suite 2000
Seattle, WA 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594
steve@hbsslaw.com
emilees@hbsslaw.com
stephaniev@hbsslaw.com

Benjamin J. Siegel (SBN 256260)
HAGENS BERMAN SOBOL SHAPIRO LLP
715 Hearst Avenue, Suite 202
Berkeley, CA 94710
Telephone: (510) 725-3000
Facsimile: (510) 725-3001
bens@hbsslaw.com

Attorneys for Plaintiffs and the Proposed Classes

E-FILING ATTESTATION

I, Jeffrey L. Kessler, am the ECF User whose ID and password are being used to file this document. In compliance with Civil Local Rule 5-1(i)(3), I hereby attest that each of the signatories identified above has concurred in this filing.

/s/ Jeffrey L. Kessler
JEFFREY L. KESSLER